Supreme Court, U.S.
FILED

03 - 35 MAY 20 2003

U.S. DOCKET NO._____

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

TERM: October Term, 2002.

ROD L. BURR,)
Petitioner,)
vs.)
)
COMMISSIONER OF INTERNAL REVENUE,)
Respondents.)

ON PETITION for WRIT of CERTIORARI to the UNITED STATES COURT of APPEALS for the FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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RESPONDENT COUNCILS OF RECORD

68 pp

I. QUESTION PRESENTED FOR REVIEW

1. Is it not true that 26 U.S.C. 6511, as interpreted and administered by the Internal Revenue Service, imposes an effective "double-taxation" upon a certain class of citizens, which **(A)** is in contradiction to a longstanding Constitutional principle, *"Forman v. Commissioner of Internal Revenue", 199 F2d. 881 (1952) "The presumption against double taxation is always present";* **(B)** is inconsistent with fundamental principles in equity; **(C)** imposes a penalty that is commonly disproportionate to the offense *(with no limit, can easily exceed $10,000 or even $100,000),* in violation of the 5th, 8th & 9th Amendments to the U.S. Constitution; and which **(D)** violates the 14th Amendment, Equal Protection Clause, as the "double-taxation" penalty (which has no dollar limit) only impacts the class of well intentioned taxpayers that overpay their taxes *(but are unable to complete attendant paperwork),* while not impacting less faithful

citizens who do not pay their taxes at all, and who are never-the-less, ultimately forced to pay their taxes only once?

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III. OPINIONS and ORDERS

United States Tax Court, Case# 12918-99, Hon. Joseph H. Gale, presiding:

Opinion: Filed **March 25, 2002**

Decision: Filed **July 12, 2002**.

Unites States Court of Appeals for the 4th Circuit,

Case No. 02-2205:

Opinion and Decision: Filed **Feb. 20, 2003**.

IV. JURISDICTION

1. This Court's jurisdiction is invoked under Title 28, Section 1254 of the United States Code.

2. Relief is sought from the Fourth Circuit Judgment entered on Feb. 20, 2003.

3. The 90-day period for Timely filing, pursuant to Rule 13 had not expired as of May 20th, 2003, when this Petition was originally file.

4. The 60-day extension granted by the Office of Clerk of the U.S. Supreme Court, to improve the "form" of this filing, has not expired.

5. Though Rules 29.4(b) and (c) do not apply (since a Federal Agency *is* a party), 29.4(a) *does* apply. Also, an act of Congress may be drawn into question, depending upon the findings of this Court. Accordingly, Notification to the Office of the Solicitor General of the United States has been made.

V. CONSTITUTIONAL PROVISION, STATUTE, and RULE CITATIONS.

5th Ammendment to the U.S. Constitution: "No person shall be... deprived of... property, without due process of law".

8th Ammendment to the U.S. Constitution: "Excessive bail shall not be required, nor excessive fines imposed..."

9th Ammendment to the U.S. Constitution: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

26 U.S.C. 6511(b)(1)- "No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period."

TAX COURT RULE #39- "A party shall set forth in the party's pleading any matter constituting an avoidance or affirmative defense, including res judicata, collateral estoppel, waiver, duress, fraud, and the statute of limitations. A mere denial in a responsive pleading will not be sufficient to raise any such issue."

TAX COURT RULE #110-"The Court may, in its discretion, issue appropriate pretrial orders."

TAX COURT, STANDING PRE-TRIAL ORDER- "...the Court expects the parties to negotiate in good faith... Ordered that all facts shall be stipulated to the maximum extent possible."

VI. STATEMENT OF CASE, GENERAL

Due to the occurrence and unfolding of several tax events during 1994 through 1997, which were unusual for Petitioner (involving employment change, relocation, real estate transactions, and three state jurisdictional impacts), also due to the uncertainty as to what the actual tax impacts would ultimately be *(though knowing that the distribution of income and expenses between years would be irregular),* and in the desire to error on the side of caution, Petitioner arranged for employment withholdings during 1994 to exceed his expected tax liability. This was done in the belief and faith that he would thereby protect against the occurrence of a tax deficiency, and that principles in common equity would permit him to match those excess payments back against whatever income irregularities lagged into the following year(s), through the tax overpayment carryforward provisions.

As Petitioner began to work through the computations of his situation, he began to encounter complexities in establishing the appropriate "basis" values for the real estate transactions. Gathering all of the necessary records and information began to become a greater problem than had been anticipated. This made it impossible to know what figures to use in his 1994 tax return. It became necessary to research the tax laws in order to discover proper handlings, but due to employment demands, the inaccessibility of legal resources, and unaffordability of professional assistance, the effort progressed very slowly (though petitioner *did* continue to pursue it in good faith). Confident that he had made, and was continuing to make, adequate tax payments, he wasn't in fear that there would be any consequences in terms of payment shortages, penalties or interest. He knew that the only impact would be a loss of the use of his overpayment funds, for the duration of the time it took to resolve his discrepancies, and he was prepared to accept that impact.

The difficulty experienced by petitioner was *precisely* what was being referred to by Congress, when it subsequently *repealed* the capital gains tax on primary residences, while declaring that this law had been "the single most burdensome tax complexity, imposed upon taxpayers".

Petitioner was also unable to know how to compute his precise tax liabilities for the *subsequent* years, *partly* because related transactions continued into late 1996, and *also* because he was still unable to compute the correct amount to *carry forward* from 1994. He could not have filled out his 1995 or 1996 forms without the 1994 carryforward, because that would have resulted in a false overstatement of his actual tax liability, and would have forced him to pay sizable additional taxes, which he did not owe, and could not afford to pay, anyway. Those filings, therefore, *also* had to await the completion of the 1994 forms. Petitioner remained confident that his pattern of overpayment would protect him against deficiencies, penalties and interest fines, once he *did*

complete his research and his forms. He continued to *accept* that this meant that the federal government was benefiting from the interest free use of his overpayments, and if any underpayments *did* ultimately occur, he was confident they would be small, and he was willing to accept the minimal penalties and interest that could result from such an occurrence.

Over the course of the next two years, Petitioner gradually resolved each of the outstanding uncertainties, and was approaching the completion of his task when, in April of 1999, he received Notices of Deficiency from the IRS for 1995 and 1996. 1994 had evidently been excluded from review, as the IRS had apparently *recognized* the disproportionately higher tax payments, and apparently wished to block those from the risk of being entering into any "offset" computation, through it's "jurisdictional exclusion" tactic *(which works only in Tax Court, as it does not have the same equity review powers as a Federal District*

Court does... thereby, prejudicing ... in violation of the "principle" of "equal protection"... Taxpayers that cannot afford the District Court "entry fee" of prepayment of alleged deficiencies). 1997 was evidently excluded because it did not yet fit within the timeframe that was to the IRS' procedural advantage.

Because Petitioner was very close to completing his research, he was able to finalize the forms for all outstanding years in less than 3 months, and his Returns for 1994, 1995, 1996, 1997, and 1998 were filed by July of 1999. Indeed, *as anticipated,* the net due for all years, *combined*, after offsetting with taxes paid, was approximately $350. With a relatively minor exception, the proper taxes had been paid in a timely manner, throughout.

The deficiencies claimed by the IRS for 1995 and 1996 were approximately $27,000, though a justification for that computation, *(which was insisted, even in the face of full*

disclosure of the facts, and through a bad faith refusal to budge during the stipulation conference) was never provided.

In self-defense, Petitioner filed Petition for Redetermination of Deficiency pursuant to 26 U.S.C. 7453, with the Tax Court having jurisdiction under 26 U.S.C. 26-7442.

As it turned out, the IRS acknowledged in the trial that it had no basis for any claim beyond $1,700, and at that point retracted its excess claim, without explanation.

Petitioner pointed out that the only explanation for this behavior, was that the IRS knows that if a taxpayer stumbles procedurally, by law, he can lose the opportunity to protest when the IRS forces collection of its "full claim", and that the IRS would no longer be required to justify its computations.

It follows then, that the IRS was preserving a claim it knew to be false, solely to preserve its "maximum collection potential" in the event that this petitioner stumbled

procedurally. This suggests, rather strongly, that the IRS is operating in a manner that clearly violates Tax Court Rules, and is deliberately unethical, if not openly fraudulent. Petitioner called for sanctions in response to this behavior, according to Tax Court Rule, but was denied.

The IRS also withheld its legal argument until one week before trial, in violation of Rule #39 (which specifies a summary judgment in favor of taxpayers, in such event), but petitioner's Motion regarding this abuse was also summarily dismissed, ironically, the motion denial was unjustly based in the lateness of the filing, which was *caused* by the very transgression being complained about.

Once its excess claim had been withdrawn, the essence of the *remaining* IRS claim was that agency's interpretation, that U.S.C. §26-6511 *prohibits recogn*ition of a tax payment carryforward, even though "carryforwards" are not expressly addressed within the statute.

The fundamental injustices that are threatened to result from the effect of this law are:

a). Even though it is known that Petitioner paid the correct taxes, he will *quite literally* be forced to pay a portion of them a second time.

b). The justifying logic amounts to a *technicality* that 'surgically separates' *(by imaginary calendar line),* what would have been recognized, in any other setting, as essentially *two halves* of a "paired transaction set"... to the unjust advantage of one party over another... something that concepts in justice simply do not permit.

c). The resulting $3,000-$5,000 "fine" *(double-payment, penalties & interest)* amounts to a d*isproportionately high* "Late paperwork filing fee", since the actual taxes were paid, and no other transgression was committed.

d). This *particular* late filing penalty only applies to "good faith taxpayers" that actually *pay* their taxes. *They*

have to pay their taxes *twice*, while citizens who decline to pay their taxes altogether, only have to pay them once.

e). It also amounts to an ingracious "penalty" for granting the United States Government, interest free use of personal funds.

All of these arguments were properly presented (repeatedly and at every stage), to the Tax Court and subsequently to the Fourth Circuit Court of Appeals, but were not examined.

The present petition complains that resolution in those courts was not possible, because the issues properly raised by Petitioner were not given even *summary* consideration. With the result that, since the requirements of Procedural Due Process, as established by this Court, requires a "Meaningful Hearing", due process has been denied throughout.

Petitioner now also reiterates those issues for genuine consideration and just resolution.

VII. STATEMENT OF CASE,

ISSUES PROPERLY RAISED:

A. TAX COURT, PETITIONER'S BRIEF, pg 16. "Not only is this statutory interpretation technically correct, it is also the one which impedes the manifest injustice perpetrated by the IRS in its justification of 'double taxation'..." Petitioner asserted *throughout*, a "right" to full OFFSET for "Payments Made".

B. TAX COURT, RESPONDENT'S BRIEF. No Response on these issues.

C. TAX COURT, PETITIONER'S ANSWERING BRIEF, p.4, "More specifically, this case is about an active practice by the IRS of EXTORTING excessive penalties from taxpayers (who have paid their correct taxes on time), simply because of 'clerical failures' involved in the attendant paperwork. A real sense of 'Justice' implies a principle,

which recognizes that FAIR TAX COLLECTION is the primary objective of the agency, and that penalties (particularly sizeable penalties) should be related to failures by taxpayers to... bear their fair tax burden. The secondary (and ancillary) goal of having paperwork be in order, should not be subject to exorbitant fines, if any at all... Penalties, which base their COMPUTATIONS Upon a Presumption that taxes were not paid, when in fact, they were, defies every tenet of fairness, equity and justice. The harshness of the resulting penalty calculation is disproportionate to the offense, and does represent an abuse, that should be curbed."

D. TAX COURT, MEMORANDUM OPINION. While the Court did address several issues raised, as to the fidelity of the IRS' interpretation of Section 6511 to congressional intent, the Court did NOT comment, regarding the Constitutional Issues raised.

E. FOURTH CIRCUIT COURT OF APPEALS, DOCKETING STATEMENT, p.4, "Issues to be Raised on Appeal", p.5, "the three general interpretational guidelines, set forth by the High Court, which Appellant has asserted are usurped by the IRS' position... are: ...(c). the Constitutional guarantee against cruel and unusual punishment, is invoked when the penalty exacted by a governmental authority is disproportionate to the offense. Under this guideline, even if a Court ... ruled that Congress *intended* this heavy-handed, and fundamentally unjust, practice, that intent would be Constitutionally barred, and the statute voided, under this principle of 'excessiveness'."

F. FOURTH CIRCUIT COURT OF APPEALS, APPELLANT'S INFORMAL BRIEF, p.12, "Requested Findings", "26. If the Court were to determine that Congress did intend that taxpayers should be penalized to the point of paying taxes twice for merely failing to file the attendant paperwork on time, wouldn't that constitute a violation of the 'Disproportionate Penalties' Clause of Constitutional guarantee against 'Cruel and Unusual Punishment, and thereby, finally render the statute, consequently, altogether null and void?"

G. FOURTH CIRCUIT COURT OF APPEALS, MEMORANDUM BRIEF FOR THE APPELLEE- Appellee did not respond to Constitutionality issues reflected herein, but *instead*, merely reiterated an earlier Jurisdictional argument, which, even if prevailing, would only create *additional*, previously unrecognized, "Equal Protection"

issues, and it weakly defended against Petitioner's Rule#39 violation claim.

H. FOURTH CIRCUIT COURT OF APPEALS, APPELLANT'S REPLY BRIEF- Clearly, case-by-case, demonstrated how Appellee had misrepresented the meaning of each citation relied upon.

I. FOURTH CIRCUIT COURT OF APPEALS, JUDGMENT- Affirmed the TAX COURT without providing a meaningful explanation.

VIII. ARGUMENT

"WE hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, and that among these are Life, Liberty and the Pursuit of Happiness."

The American vision of Liberty *requires* that a government *respect*, that there are *numerous* unalienable rights, and that among those are *others* not specifically listed in the Declaration of Independence. THIS was the basis for the 9th Amendment, which states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Among these "other" inalienable rights retained by the people is the right not to be treated in *any* fundamentally unfair, or unjust manner by their government.

Balancing of Accounts.

Citizens have a fundamental right to rely, *confidently*, upon the obligation of all governmental bodies to give full recognition to the TRUTH of legitimate fact. In the case of business transactions, citizens have an unalienable right to have full recognition (and judicial notice) given to the *fact* that they have performed whatever good faith acts, they *have*

performed in the conduct of their business. Furthermore, citizens have a right to rely upon such governmental bodies to give FULL, reasonable credit FOR those acts, when it becomes necessary for those governmental bodies to adjudicate a "balancing of accounts" where payments and receipts are balanced against each other, for purposes of determining fair resolution between parties.

When payments are made, products are provided, or services are performed, people have surrendered something of value, and they are entitled to *full recognition* of this "delivery of consideration" in any claim *brought* by those who have received the benefit OF those considerations.

This principle is universal, and inalienable, and is not subject to suspension just because one party happens to be a governmental agency.

The very idea of giving full credit to the value of a claimant's claim, while ignoring the value returned by a defendant is ABSURD, *besides* being unconscionable.

Every known version of Justice would scream... at the suggestion that such an adjudication was in any way justifiable.

How much more improper is it, then, for an American Governmental agency to write laws, which assert that it is entitled to receive this kind of one-sided resolution as a matter of routine?

By itself, it isn't so improper for the government to assert that refunds must be claimed within a certain period, but using this as a technicality... to "invalidate" the FACT that overpayments even occurred, so that related periods can be reopened and additional taxes can be reassessed, in such a way that the natural matching of transaction sets....is BLOCKED, just because they happen to straddle calendar lines... is *unforgivable.*

It's not just unethical... it's not just unconscionable... it's not just villainous ... and it's not just inexcusable... for a United States Federal agency to be engaging in such

practice... is UNCONSTITUTIONAL, in that it criminally victimizes taxpayers... and subjects them to a fundamental injustice that DOES shock the public consciousness.

THAT is why this issue appeared for THREE consecutive years, in the REPORT to Congress by the Office of the Taxpayer Advocate, as THE most litigated Tax complaint. The public outrage HAS been expressed, but no one in government cares to listen.

Now THIS Court has the opportunity. What message will *it* chose to send?

This petitioner sees no problem with permitting 26 U.S.C. 6511 to impose a Statute of Limitations on Refund Requests. However, that statute should *never* be construed to prevent a taxpayer from properly computing their "fair taxes due". It should never be permitted...to be construed by the IRS... to prevent a taxpayer from matching taxes paid against the tax liabilities that they would rightfully be matched against, in all other circumstances.

Even if a taxpayer cannot request a cash refund, his right to have any overpayments available to offset any tax liabilities that might be asserted, in a same or related period, must be considered to be inviolate.

The most reasonable way to ensure this… is to recognize that overpayment carryforwards are *always* available, even when the option of a cash refund has expired. This rather resembles the retail policy of "No Refunds, Exchanges Only".

It minimizes the cash flow impact that a significant number of late refund requests might pose upon the U.S. Treasury, leveling out revenue flows, while preserving the right of the people to fair treatment.

6-30-03

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IX. APPENDIX:

LOWER COURT ORDERS AND OPINIONS

A. T.C. Memo. 2002-69

UNITED STATES TAX COURT

Rodney L. Burr Petitione v.

Commissioner of Internal Revenue, Respondent

Docket No.12918-99 Filed: **Mar 25, 2002**

Rodney L. Burr, pro se.

Kathleen K. Raup, for respondent.

MEMORANDUM OPINION

Gale, Judge: Respondent determined the following deficiencies and additions to tax with respect to petitioner's Federal income taxes:

A. Additions to Tax

Year	Deficiency	Sec. 6651(a1)	Sec. 6651(a2)	Sec. 6654(a)
1995	$10,058	$1,683	$1,122	$392
1996	11,475	1,775	710	403

Unless otherwise noted, all section references are to the Internal Revenue Code in effect for the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

After concessions, we must decide the following issues:

(1) Whether petitioner has an overpayment for 1995 and, if so, whether such overpayment may be used as a credit against his 1996 tax liability;

(2) Whether petitioner is liable for additions to tax under section 6651(a)(1) and (2); and

(3) Whether petitioner is liable for additions to tax under section 6654.

Some of the facts have been stipulated and are so found. The stipulation of facts, together with the exhibits attached thereto, is incorporated herein by this reference. At the time the petition was filed, petitioner resided in Elkton, Maryland.

Petitioner did not file timely Federal income tax returns for 1994, 1995, or 1996, nor request extensions of time to file with respect to those years. On April, 19, 1999, respondent issued separate statutory notices of deficiency for petitioner's 1995 and 1996 tax years. Respondent's determinations were based on information returns received from third parties reporting income petitioner earned during the relevant years.

On July 14, 1999, respondent received petitioner's 1994 Federal income tax return reporting a tax liability of $4,378 and income tax withheld of $6,137, resulting in an overpayment of $1,759 that petitioner thereon requested be applied to his 1995 estimated tax. Respondent accepted petitioner's 1994 return as filed on January 23, 2000, and

petitioner's 1994 return as filed on January 23, 2000, and subsequently assessed the tax liability reported thereon.

On July 22, 1999, respondent received petitioner's 1995 and 1996 Federal income tax returns. Petitioner's 1995 return reported a tax liability of $4,087, income tax withheld of $2,578, and an overpayment credit of $1,759 from 1994, resulting in overpayment of $250 that petitioner thereon requested be applied to his 1996 estimated tax. Petitioner's 1996 return reported a tax liability of $5,224, income tax withheld of $3,585, and an overpayment credit of $250 from 1995, resulting in a payment due for that year of $1,389. Attached to the 1996 return was a Form 8275, disclosure statement, on which petitioner, inter alia, provided explanations with respect to his late filing and late payment. Respondent later accepted petitioner's 1995 and 1996 returns as filed but did not assess the tax liabilities reported thereon. Other than the withholdings previously outlined, petitioner made no additional payments of Federal income tax with

respect to his 1995 and 1996 tax years after the notices of deficiency for those years were issued on April 19, 1999.

Overpayment issue

As a result of petitioner's submission and respondent's acceptance of returns for 1995 and 1996 after the issuance of notices of deficiency for those years, the parties agree that the amount of Federal income tax imposed on petitioner is $4,087 in 1995 and $5,224 in 1996. There is likewise no dispute as to the amounts withheld as taxes from petitioner's wages during those years. However, a dispute remains concerning whether petitioner has an overpayment in 1995 that may be applied against his tax liability for 1996. Petitioner claims he overpaid his 1995 tax liability by $250 and that such overpayment should be credited as an estimated tax payment against his 1996 tax liability. The difference between the parties' positions can be traced to an overpayment of petitioner's 1994 tax liability in the amount of $1,759 that petitioner seeks to apply against his 1995 tax

liability. (If applied as petitioner contends, the 1994 overpayment would result in an overpayment of $250 for 1995.)

In years where this court has jurisdiction to redetermine a taxpayer's deficiency, we also have jurisdiction to determine whether the taxpayer has made an overpayment of income tax. Sec. 6512(b)(1); Winn-Dixie Stores, Inc. & Subs. V. Commissioner, 110 T.C. 291, 295 (1998). Respondent issued notices of deficiency containing determinations that petitioner is liable for deficiencies in income tax for 1995 and 1996; petitioner filed a timely petition with this Court contesting respondent's determinations. Accordingly, this Court has jurisdiction to redetermine the amount of petitioner's deficiencies for 1995 and 1996, and to determine whether petitioner has an overpayment for either year.

Respondent argues that petitioner does not have an overpayment for 1995 because the credit petitioner seeks for his 1994 overpayment was time-barred when petitioner first

claimed it. Petitioner argues that his 1994 overpayment must be taken into account when determining whether he has an overpayment for 1995 because respondent accepted his 1994 return, claiming a credit for such overpayment, as filed.

When a taxpayer's payments, including allowable credits for income taxes withheld from wages and the prior year's overpayment, exceed the total tax imposed for the year there is an overpayment. Secs. 31(a), 35, 6401(b)(1), 6402(b); see also Bachner v. Commissioner, 109 T.C. 125, 128 (1997) (interpreting "overpayment" to mean any payment of tax in excess of that which is properly due), affd. Without published opinion 172 F.3d 859 (3d Cir. 1998). It follows that in order for this Court to find an overpayment for petitioner's 1995 tax year, we must find that petitioner's total tax payments for 1995 exceeded the tax imposed for that year. See Bachner v. Commissioner, supra at 129; Stephenson v. Commissioner, T.C. Memo. 1995-32.

Of the $4,087 total imposed on petitioner for 1995, $2,578 has been satisfied by tax payments that were withheld from his wages in 1995. No other payments were made with respect to his 1995 taxable year after issuance of the notice of deficiency. On his 1994 return, petitioner sought to credit his $1,759 overpayment for 1994 against his estimated tax for 1995 and maintains in this proceeding that he is entitled to do so. Respondent argues that petitioner may not credit his 1994 overpayment against his estimated tax for 1995 because petitioner did not claim a credit for the overpayment within the applicable period of limitations. We agree with respondent.

Section 6402 and the regulations thereunder govern respondent's authority to credit income tax for the succeeding taxable year. Respondent's authority to do so is specifically limited to allowing credits of overpayments for which a claim has been filed within the applicable period of limitations. See sec. 6402(a) and (b); secs. 301.6402-2(a)(1)

and 301.6402-3(a)(5), Proced. & Admin Regs. Section 6511, governing the period of limitations for claiming credits and refunds, provides that where no return has been filed, a taxpayer must make a claim for an overpayment credit within 2 years of the date the taxes were paid. Sec. 6511(a). Likewise, the amount of any credit is limited to taxes paid within 2 years prior to the date the claim is filed. Sec. 6511(b)(2)(B).

The record in this case establishes that petitioner's 1994 tax payments consisted solely of withholdings that occurred during 1994. The amounts so withheld are deemed to have been paid on April 15, 1995. Sec. 6513(b)(1). Petitioner's untimely 1994 return, on which he first claimed the 1994 overpayment credit, was not received by respondent until July 14, 1999, more than 4 years after the taxes were deemed paid. Therefore, petitioner's claim for a credit of his 1994 overpayment, filed outside the 2-year period provided under section 6511, was not timely. Accordingly, under section

6402, respondent did not have authority to award such credit, either against petitioner's estimated tax for 1995 or otherwise.

Citing section 6214(b), petitioner argues that his overpayment of his 1994 taxes is a "fact", established when respondent accepted his 1994 return as filed, that this Court must "consider" in redetermining his 1995 deficiency; i.e., that pursuant to section 6214(b) we should credit the $1,759 overpayment for 1994 against his tax liability for 1995. Section 6214(b) does not confer such authority. While the "fact" that petitioner overpaid his 1994 taxes by $1,759 is undisputed, it does not follow that this overpayment may constitute a payment of tax for 1995 in contravention of the provisions of sections 6402 and 6511. Section 6402 governs the circumstances in which an overpayment in one year may be treated as a payment of tax for a succeeding year; section 6402 and the regulations thereunder condition this treatment on a claim for a credit of the preceding year's overpayment

that is made within the applicable period of limitations. See Secs. 6402(a) and (b), 6511; secs. 301.6402-2(a), 301.6402-3(a)(5), Proced. & Admin. Regs.

Petitioner also contends that respondent asserted an affirmative defense by taking the position that petitioner's claim for a credit of his 1994 tax overpayment was time-barred under section 6511. Accordingly, petitioner argues that respondent waived such a defense when he failed to plead it in his answer as required under Rule 39. We disagree.

First, if the pleadings are to be strictly construed herein, we have some doubt that petitioner's pleadings were sufficient to notify respondent that petitioner was seeking a credit of a 1994 overpayment. The petition seeks not a credit but a "Tax Payment carry-forward", a term of petitioner's invention. In any event, we have held in similar circumstances that the Commissioner was not required to plead affirmatively that an overpayment was time barred

under section 6512(b)(3). See Gabelman v. Commissioner, T.C. Memo. 1993-592, affd. 86 F.3d 609 (6th Cir. 1996). Moreover, respondent's position that a credit of petitioner's 1994 overpayment is time barred was clearly stated in his trial memorandum, and we are unable to discern any prejudice to petitioner. See id.

Finally, petitioner attempts to avoid the consequences of the Internal Revenue Code's prescribed limitations periods by arguing that his effort to apply his 1994 overpayment against his 1995 tax liability is not a "credit" but instead a "payment carryforward". A "payment carryforward", petitioner claims, is not subject to the period of limitations provided in section 6511. Petitioner derives the concept of a "payment carryforward" from section 6513(d) and contends that that section entitles him to apply his 1994 overpayment against his 1995 liablity without regard to the period of limitations set forth under section 6511.

Section 6513(d) does not operate as petitioner argues. That section's purpose is: (i) to provide a rule for deeming when an overpayment credited to the succeeding year's estimated tax is considered paid and (ii) to clarify that any claim for a credit or refund of an overpayment credited against a subsequent year's tax liability must be made with respect to the subsequent year rather than the year in which the overpayment arose. Furthermore, contrary to petitioner's contentions, section 6513(d) does not operate outside of the limitations periods of section 6511. Rather, it specifically incorporates them. Section 6513(d) begins with the following conditional clause: "If any overpayment of income tax is, in accordance with section 6402(b), claimed as a credit against estimated tax for the succeeding taxable year". Sec. 6513(d) (emphasis added). As previously noted, section 6402(b) incorporates a requirement that any claim for a credit or refund must be filed within the section 6511 period of limitations applicable to claims for overpayment credits.

Thus, section 6513(d) operates only where a credit for an overpayment has been claimed within the applicable period of limitations. That section is of no help to petitioner.

Based on the foregoing, we conclude that petitioner does not have an overpayment in his 1995 taxable year. Because any credit of the 1994 overpayment against petitioner's estimated tax for 1995 is time-barred, petitioner's payments with respect to 1995 consist solely of the $2,578 withheld from his wages in that year. The parties agree that the tax imposed on petitioner for 1995 is $4,087. Therefore, the deficiency for that year is $4,087; i.e., the amount by which the tax imposed exceeds the amount shown on the return. The amount shown on the return for this purposes is zero where no return is filed prior to the issuance of the notice of deficiency. See Laing v. United States, 423 U.S. 161, 173 (1976); Hartman v. Commissioner, 65 T.C. 542, 546 (1975); sec. 301.6211-1(a), Proced. & Admin. Regs. Accordingly, we find that for 1995 there is a deficiency and further that

there is no overpayment, as petitioner's payments do not exceed the tax imposed. See sec. 6512(b)(1); Bachner v. commissioner, 109 T.C. at 128-129.

Our conclusions regarding the 1995 overpayment also resolve any remaining issues in 1996. There being no overpayment in 1995, petitioner's contention that he has a $250 overpayment for 1995 that may be credited against his 1996 tax liability must fail. Consequently, the only payments petitioner has made with respect to his 1996 tax liability are the amounts withheld from his wages in 1996. There is a deficiency in that year of $5,224; i.e., the difference between the agreed amount imposed ($5,224) and the amount treated as shown on the return ($0). See sec. 301.6211(a), Proced. & Admin. Regs.

Certain allegations by petitioner of misconduct by respondent, including respondent's "using the power of the... Tax Court to extort money" in respect of a claim that is "fraudulently overstated", merit comment. First, petitioner

contends that respondent's unwillingness to credit his 1994 overpayment against his tax liabilities for 1995 or 1996 was 'abusive'. We disagree. Petitioner cannot recover his 1994 overpayment because he failed to file a timely return or claim. Because petitioner's claim was untimely, respondent was precluded by law from crediting or refunding any portion of the 1994 overpayement. Moreover, the Supreme Court has recently reiterated that the provisions of section 6511, establishing the period of limitations for recovering overpayments, are to be strictly construed, see United States v. Brockamp, 519 U.S. 347, 352-354 (1997), and Congress, after recently scrutinizing section 6511, has seen fit to change it only in circumstances for which petitioner would not qualify. See sec. 6511(h), enacted by Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 1998), Pub. L. 105-206, sec. 3202(a), 112 Stat. 740 (relaxation of limitations period where taxpayer physically or mentally impaired); sec. 6512(b)(3), amended by Taxpayer Relief Act

of 1997, Pub. L. 105-34, sec. 1282(a), 111 Stat. 1037 (3- rather than 2-year "look-back" period where no return filed and deficiency notice issued in third year after return due).

A second allegation made by petitioner is that respondent acted improperly in this case by asserting deficiencies for 1995 and 1996 that he knew or should have known were far in excess of what petitioner rightfully owed and then sought to use the Tax Court process to "extort" money from petitioner.

Our review of the entire record in this case does not indicate that respondent has acted improperly. We see nothing improper in the original deficiency determinations. Petitioner was treated the same as any non-filer: respondent computed the deficiencies based on information returns from third parties and accorded him the single filing status and single exemption to which he would be entitled in the absence of any further information or substantiation. Given the proximity of the notices of deficiency and the filing of

respondent's answer in this case, we see no impropriety in respondent's maintaining the same position in his answer as in the notices. The record does not indicate when petitioner's 1995 and 1996 returns, submitted after the issuance of the notices of deficiency, were accepted as filed, except that it is clear the returns had been accepted at least 15 days prior to trial, when trial memoranda were served. Whether respondent unreasonably delayed accepting the 1995 and 1996 returns in some effort to intimidate petitioner has not been established on this record. We therefore find no basis for petitioner's claims of improper conduct by respondent.

Additions to Tax Under Section 6651(a)(1) and (2). Respondent determined for the years in issue that petitioner is liable for additions to tax under section 6651(a)(1) for failure to file timely tax returns and under section 6651(a)(2) for failure to pay timely. The addition to tax for failure to file a timely return equals 5 percent of the amount required to

be shown as a tax on the return for each month, or fraction thereof, during which the failure to file continues, up to a maximum of 25 percent. Sec. 6651(a)(1). For these purposes, the amount required to be shown as tax on the return is reduced by any part of the tax paid on or before the date prescribed for payment and by the amount of any credit against tax which may be claimed on the return. Sec. 6651(b)(1). The addition to tax for failure to file a timely return does not apply where the taxpayer shows that such a failure is due to reasonable cause and not due to willful neglect. Sec. 6651(a)(1).

The addition to tax for failure to pay timely is 0.5 percent of the amount shown as a tax on the return for each month, or fraction thereof, during which the failure to pay continues, up to a maximum of 25 percent. Sec. 6651(a)(2). Under section 6651(g)(2), a substitute return prepared by the Commissioner under section 6020(b) is treated as a return filed by the taxpayer for returns due after July 30, 1996

(determined without regard to extensions). See Taxpayer Bill of Rights 2, Pub. L. 104-168, sec. 1301(b), 110 Stat. 1475; Smith v. Commissioner, T.C. Memo 2000-290; sec. 301.6651-1(g), Proced. & Admin. Regs. Respondent's determination that petitioner is liable for the addition with respect to his 1995 tax year, the return for which was due before July 30, 1996, is not based on an amount shown as tax on a return filed by petitioner. Petitioner did not file a return prior to the issuance of the notice of deficiency for 1995. See Heisey v. Commissioner, T.C. Memo 2002-41. Accordingly, we do not sustain the determination that petitioner is liable for the addition for failure to pay for 1995.

In court proceedings that arise in connection with examinations commenced after July 22, 1998, the Commissinoer bears the burden of producing sufficient evidence to indicate that it is appropriate to impose any additions to tax provided for in the Internal Revenue Code. Sec. 7491(c), enacted by RRA 1998 sec. 3001, 112 Stat. 726;

Higbee v. Commissioner, 116 T.C. 438, 446-447 92001). Where no examination has been conducted, the provisions of section 7491(c) apply to court proceedings that arise in connection with taxable periods or events beginning of occurring July 22 1998. RRA 1998 sec. 3001(c)(2), 112 Stat. 726. Once the Commissioner meets his burden of production under section 7491(c), the taxpayer bears the burden of establishing that a reasonable cause exception applies. Higbee v. Commissioner, supra at 447.

Respondent claims that thre was no "examination" of petitioner's 1995 and 1996 returns because those returns were accepted as filed. Therefore, since petitioner's 1995 and 1996 tax years began prior to July 22, 1998, respondent argues that he does not bear the burden of production under section 7491(c).

We disagree. The legislative history of sec. 7491(c) illustrates that Congress intended the term "examination" to include events other than audits, such as the matching of

amounts reported on information returns against amounts reported on a tax return, or the review of a claim for refund prior to issuing the refund. H. Conf. Rept. 105-599, at 242 (1998), 1998-3 C.B. 747, 996. Respondent's argument that there was no examination because the returns were accepted as filed overlooks the fact that the additions were determined before the returns were filed. Given that the deficiency notices were issued on April 19, 1999, and the determinations therein were based on a review of information returns, we find that examinations within the meaninging of the effective date provisions of section 7491 occurred after July 22, 1998, in this case.

The stipulations in this case establish that petitioner did not file his 1995 and 1996 returns until July 1999. Thus respondent has satisfied his burden of production with respect to the additions to tax for failure to file timely returns.

With respect to the additions to tax for failure to pay timely for 1996, it is undisputed that petitioner filed no return for 1996 prior to the notice of deficiency. Thus, any addition to tax for failure to pay must be based upon a substitute for return under section 6020(b) pursuant to section 6651(g). Respondent has neither presented any evidence nor made any argument that a substitute return under 6020(b) exists with respect to petitioner's 1996 tax year. Accordingly, respondent has failed to meet his burden of production with respect to the addition to tax for failure to pay for 1996. See Heisey v. commissioner, supra. The determination that petitioner is liable for the addition for failure to pay for 1996 is not sustained.

Respondent having met his burden of production with respect to the additions for failure to file, petitioner bears the burden of proving that he had a reasonable cause for his failure. A failure to file timely returns is generally considered due to reasonable cause where a taxpayer is

unable to file the return within the prescribed time despite exercising ordinary business care and prudence. Estate of Eddy v. Commissioner, 115 T.C. 135, 141 (2000); sec. 301.6651-1(c)(1), Proced. Admin. Regs.

Petitioner argues that his failure to file timely returns for the years at issue was due to reasonable cause arising from his work-related relocation in 1994. Petitioner's argument, as we understand it, is that he did not file timely returns for 1995 or 1996 because he did not think that those returns could be completed accurately until his 1994 return was filed. Petitioner claims he could not file his 1994 return by its due data because he had some difficulty understanding certain provisions of the tax law and because some of the information he needed to complete his 1994 return was in storage.

In general, uncertainty regarding the application of Federal tax laws to a particular set of facts, or the unavailability of records, does not provide reasonable cause for failing to file

a timely tax return. See Surridge v. Commissioner, T.C. Memo. 1998-304; Columbus v. Commissioner, T.C. Memo. 1998-60, affd. Without published opinion 162 F.3d 1172 (10th Cir. 1998). In any event, the "relocation" issue for 1994 had no impact upon petitioner's tax computations for his 1995 and 1996 taxable years. In our view, petitioner could have exercised ordinary business care and prudence by filing a timely 1994 return using the best information available and then amending the return to the extent necessary; the 1994 difficulties simply provide no reasonable cause for the failure to file timely 1995 and 1996 returns. See Estate of Vriniotis v. Commissioner, 79 T.C. 298 (1982); Tarakci v. Commissioner, T.C. Memo. 2000-358. We accordingly sustain respondent's determinations that the failure to file addition applies to each of those years.

In the deficiency notices, respondent applied section 6651(c)(1), which limits the addition under section 6651(a)(1) by the amount of the addition under section

6651(a)(2) for any month to which an addition applies under both of those provisions. Since we have not sustained the additions to tax under section 6651(a)(2) for 1995 and 1996, the additions to tax under section 6651(a)(1) for those years ar not subject to the limitation in section 6651(c)(1). See Heisey v. Commissioner, T.C.Memo. 2002-41.

Additions to Tax under Section 6654

Respondent determined that, for both years at issue, petitioner is liable for the section 6654 addition to tax for failure to pay estimated income taxes. This addition to tax is mandatory unless petitioner shows that one of the statutorily provided exceptions applies. See Grosshandler v. Commissioner, 75 T.C. 1, 20-21 (1980); Chambers v. Commissioner, T.C. Memo. 2000-218. As the 1995 and 1996 returns show that petitioner's estimated taxes for those years fell substantially short of the income tax liabilities reported thereon, we find that respondent has satisfied his burden of production under section 7491(c). Petitioner has

not introduced any evidence to support a finding that respondent's determinations with respect to the section 6654 addition are erroneous or that any of the statutory exceptions apply. Accordingly, we sustain the determinations. To reflect the foregoing, Decision will be entered under Rule 155.

B. UNITED STATES TAX COURT

Rodney L. Burr, Petitioner,

v.

Commissioner of Internal Revenue, Respondent.

Docket No. 12918-99 Filed: **July 12, 2002**

DECISION

Pursuant to the opinion of the Court filed March 25, 2002, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is ORDERED AND DECIDED: That there are deficiencies in income tax due from petitioner for the taxable years 1995

and 1996 in the amounts of $4,087.00 and $5,224.00, respectively;

That there are additions to tax due from petitioner for the taxable years 1995 and 1996 under provisions of I.R.C. sec. 6651(a)(1) in the amounts of $377.50 and $245.85, respectively.

That there are no additions to tax due from petitioner for the taxable years 1995 and 1996, under the provisions of I.R.C. sec. 6651(a)(2);

That there are additions to tax due from petitioner for the taxable years 1995 and 1996 under the provisions of I.R.C. sec. 6654(a) in the amounts of $66.03 and $66.03 respectively.

C.

UNITED STATES COURT OF APPEALS

For the FOURTH CIRCUIT

Docket No. 02-2205

Rodney L. Burr, Petitioner,

v.

Commissioner of Internal Revenue, Respondent.

Submitted:January 16, 2003 Decided: **February 20, 2003**

Before Neimeyer, Michael, and King, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Filed: **February 20, 2003**

PER CURIAM:

Rodney L. Burr appeals from the tax court's decision upholding the Commissioner's determination of deficiencies and additions to tax for the years 1995 and 1996. We have reviewed the record and find no reversible error. Accordingly, we affirm on the reasoning of the tax court. See Burr v. Internal Revenue Service, No. 99-12918 (U.S.T.C. July 12, 2002). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

CERTIFICATE OF SERVICE

This is to certify that THREE copies of the foregoing PETITION, including all attachments, was served on APPELLEEs by First Class Mail, on June 30, 2003 in a postage paid wrapper, addressed as follows:

THREE Copies to:
Eileen J. O'Connor, Asst. Atty General
Tax Division, U.S. Dept of Justice
P.O. Box 502
Washington, D.C. 20044

And THREE Copies to:
B. John Williams, Jr., Chief Counsel
Internal Revenue Service
1111 Constitution Ave, NW
Washington, DC 20224

And THREE Copies to:
Solicitor General of the United States
Room 5614,
Department of Justice
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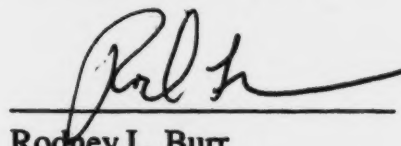

6-30-03

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